IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

MACA.No. 242 of 2003()

OPMV.177/1998 of MOTOR ACCIDENT CLAIMS TRIBUNAL, PALA
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APPELLANT/3RD RESPONDENT IN OP(MV):

NATIONAL INSURANCE COMPANY LTD.,
BRANCH PALA, REPRESENTED BY ITS DEPUTY MANAGER,
NATIONAL INSURANCE COMPANY, MOTOR THIRD PARTY
CLAIMS SECTION, AJAY VIHAR, M.G.ROAD, ERNAKULAM.

BY ADV. SRI.LAL GEORGE

RESPONDENTS: CLAIMANT & THE RESPONDENTS 1 & 2 IN THE
---------- OP (MV)

1. **SHAJU T.THURUTHEL, S/O. LUKA VARKEY,**
   THURUTHEL HOUSE, PALA.

2. **ROY MATHEW,**
   ELIPULIKKATTU, C/O. GEMINI BAKERY,
   KATTAPPANA, IDUKKI DISTRICT.

3. **ROY MATHEW,**
   ELIPULIKKATTU, CHAKKAMPUZHA, PALA.

BY ADV. SRI.MATHEW JOHN (K)
SRI.SUJESH MENON V.B.
SRI.C.J.JOY

THIS MOTOR ACCIDENT CLAIMS APPEAL HAVING BEEN FINALLY HEARD ON 27/09/2007, THE COURT ON 10/10/2007 PASSED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

M.A.C.A.No.242 of 2003

Dated this the 10th day of October, 2007

Judgment

Koshy,J.

This appeal is filed by the insurance company. Respondent sustained serious injuries in an accident. According to the appellant, while he was travelling in a scooter bearing registration No.KL-5A 6199, motor car bearing registration No. KL-6 1297 came from the opposite direction and dashed against the scooter and as a result of the collusion he fell down and sustained serious injuries, namely, left temporal contusion, linear fracture of right temporal bone, tenderness on the right upper chin, fracture on right clavicle, contusion with abrasion on the right scapula, contusion on the right shoulder, abrasion on the right hand and LMN facial palsy. The accident occurred at 9.15 p.m. on 25.7.1995 at Mundupalam in Pala-Ramapuram road. The accident occurred because of the negligence of the driver of the car KL-6 1297. Information was given to the police and crime case No.344/95 was registered in Pala police

station. He was removed to the nearby Cherupushpam Hospital immediately after the accident and he was referred to the Medical College Hospital, Kottayam where he was admitted as an inpatient and treated for a few days. But, for better management of the injuries, he was removed to the Medical Trust Hospital wherein he was admitted and treated as an inpatient from 26.7.1995 till 9.8.1995 on which date he was discharged. He claimed compensation of Rs.4,24,500/-. First and second respondents are the same as he was driver-cum-owner. Third respondent is the insurance company. Coverage of the offending car owned by the first respondent by the policy of insurance issued by the third respondent insurance company at the time of accident is not disputed. First respondent in the written statement denied the accident involving his vehicle. He also stated that even though police registered crime (Ext.A1 is the FIR), after investigation a refer report (Ext.B1) was filed. According to the first respondent, he found the petitioner lying on the road at Perumalakunnu Bhagom whereupon the first respondent stopped his car and took the injured petitioner to hospital as an act of help and there was absolutely no fault on the part of the first

respondent and there was no accident as stated in the petition.

2. Third respondent filed written statement advancing similar contentions and it is further contended by the third respondent that the car bearing registration No.KL-6 1297 was insured with them for a period from 16.12.1994 to 15.12.1995 as a taxi car, that the driver of the car, at the time of the accident, was not holding a valid driving licence with endorsement of badge to drive the vehicle and since possession of badge is mandatory for driving a transport vehicle, the act of the driver in the case at hand was illegal and hence the insurance company is not liable, that the claimant was riding his scooter and due to some reason he lost control of the vehicle and he fell down and sustained injuries and there was absolutely no connection between the car and the scooter and there was no accident as stated in the petition and hence the claimant is not entitled to recover any compensation, that the amount of compensation claimed is highly excessive and disproportionate, that according to the police, the case was false and hence the police referred the case and filed a refer report that the claimant is not entitled to recover any compensation

and that the petition is liable to be dismissed. First respondent produced Ext.B3 driving licence to prove that he was having valid driving licence and Ext.B6 permit to show that there was valid permit to the car.

3. Claimant got himself examined as PW1. He reiterated the averments in the application. He has narrated the accident and it is seen that the scooterist had taken his driver as his pillion rider and dropped him in the bus stop to enable him to catch a bus to go home. After dropping the driver in the bus stop, the scooterist was returning when he found the car coming against along the wrong side and hit his two wheeler. PW1 has categorically stated that he was proceeding along the eastern side of the road towards south whereas the car came at a very high speed along the wrong side and knocked him down. PW2 Shaji is stated to be an eye witness. A perusal of his testimony would show that he was the driver carried by the claimant in the latter's scooter and was dropped in the bus stop. According to PW2, he was proceeding towards the nearby shop to purchase a candle and match box when he found the car coming against the scooter which was proceeding after dropping him and the car came along the wrong side and

hit the scooter. It is further seen stated by him that only one of the head lights of the car was on. He deposed clearly that he had seen the accident in hitting of the car on the scooter. The scooterist fell down. First respondent who was driving the car reversed his vehicle and with the help of PW2 the injured was taken into the car and was removed to Cherupushpam Hospital. From the evidence of PW2, it can be seen that the driver of the car was known to PW2 even prior to the accident and hence he could be easily identified. Further more, they together took the injured to the hospital. According to the tribunal, who saw the demeanour of the witness, evidence of PWs 1 and 2 are consistent and they can be believed. Their cross-examination was not at all helpful to the respondent.

4. First respondent was examined as RW1. He reiterated the averments in the written statement. RW2 was examined by the respondent as an eye witnesses to the incident. But, he deposed that he travelled with RW1 in the car on the date of accident. According to him, RW1 is a close friend. He was given a free lift and he was feeling to sleep when he entered the car and he kept his eyes closed. When he heard the thud sound he opened his

eyes and found the claimant on the road in a lying position and also the overturned scooter on the side of the road. RW2 has been confronted with his version regarding his sleeping mood and sound he had heard. He has specifically stated that he heard the sound and immediately he opened his eyes and looked forward and found the man on the road and also the scooter lying nearby. At that time, the car was already stopped. RW2 stepped down from the car and came near the injured person and identified him as an acquaintance and hence he also helped the injured to be removed to the nearby Cherupushpam Hospital. He was not cross-examined by the respondent. In fact, he was cited as a witness by first respondent. He was not declared hostile. He has stated that when he was in a sleeping mood and when he closed his eyes, he heard the thud sound and immediately car stopped and found the claimant lying in the road. According to her, the thud sound he heard is only the sound of car hitting the scooter. Tribunal found as follows:

> "After a careful examination of the evidence of RW2 I am of the view that the evidence of this witness fortifies the case of the petitioner that the car hit the scooter and thus he fell down of sustaining the injuries. No other reasonable inference

> can be drawn from the evidence of RW2 that he heard the noise when the car was moving that all on a sudden he opened his eyes and found the scooter and also the man lying on the road."

5. RW3 has not seen the accident. He is the Branch Manager of the third respondent insurance company. Through his examination, Ext.B1 refer report was marked. Police officer who made Ext.B1 refer report was not examined. Ext.A2 is the copy of scene mahazar which would show that the accident occurred at a spot in the road which was wide enough for safe vehicle traffic. It is also to be mentioned that the evidence on record would show that there was no other vehicle any type of traffic other than the scooter and car involved in the accident on the road at the relevant time. Counsel for the insurance company argued that the tribunal ought to have found that the accident did not occur as alleged. The accident occurred on 25.7.1995 at 9.15 p.m. The FIR was registered only on 31.7.1995. Delay of about a week in registering the FIR is a serious matter to suggest suspicion. It is also pointed out that in Ext.B2 wound certificate cause of injury is recorded as "RTA scooter skid ചെയ്ത് വീണതിൽ വച്ച് at Mundupalam as told by bystander". The above history of the accident that the

injured fell down from the scooter due to skidding as narrated by bystander. It has come out in evidence that RW1 who was the owner-cum-driver of the offending car took him to the nearby private hospital. Since injuries were serious, he was immediately referred to the Medical College Hospital, Kottayam. On information to the father of the claimant he also reached the Medical College Hospital. The claimant was not in a condition to speak even though consciousness was not fully lost and his father also had knowledge only from RW1. RW1 went along with the patient to the Medical College Hospital even though father of the claimant also reached the hospital earlier. In the deposition of PW1, he has also deposed that RW1 is a political opponent even from college days. At the time of the accident, RW1 was a leader of the ruling party of the State and only due to his injuries he was not able to follow up with the police and refer report was filed. According to the counsel for the claimant, he was taken to the hospital only because of pressure of PW2 and RW2 at the place of accident. But, RW1 wanted to escape from the liability and he was responsible for the refer report. In any event, refer report was not properly proved. The tribunal has to

decide the case on the basis of evidence adduced before it. The fact that police filed a refer report alone can be accepted by the tribunal, but, not the contents of the refer report. The accident was proved by examination of PWs 1 and 2 and RW2. Evidence would show that the claimant was profusely bleeding in the (R) ear. He was first taken to the nearby private hospital and then taken to Medical College Hospital and thereafter to Medical Trust Hospital, Ernakulam for better treatment. Ext.A4 medical certificate would show that the injured was treated in the Medical Trust Hospital, Ernakulam. He was admitted on 26.7.1995 and discharged on 8.8.1995 with head injury temporal lobe contusion and fracture (L) temporal bone. On clinical examination, he was found to be conscious, oriented GCS (E3 M6 V5), PEARL Moving all 4limbs (R) 7th nerve LMN palsy. Swelling and tenderness at (R) temporal bone, swelling over (R) shoulder, C.T. brain (L) temporal contusion and fracture (L) temporal bone. Repeat CT on 31.7.1995 showed (L) temporal contusion and fracture (R) temporal bone. He was treated conservatively with antibiotics and analgesics. ENT, general surgical gastro-enterology consultations were given and their advice followed. On discharge, his

condition was fully conscious and ambulant. Wounds were clean and healing. Drugs were advised on discharge. He was advised to review in NS OPD after two weeks or whenever required. This certificate is seen issued by Dr.R.R.Ravi, Senior Consultant and Head of the Department of Neuro-surgery. Ext.A5 medical report would show that this was issued on 4.4.2002 and signed by Dr.R.R.Ravi, Senior Consultant and Head of Department of Neuro-surgery. It is seen reported in this document that the injured was admitted in Neuro-surgery on 26.7.1995 and C.T. scan brain showed fracture right temporal bone with fracture haematome. X-ray right shoulder showed fracture clavicle. Following discharge, he presented with tinnitus (3/4/2002) and was found to have mild sensory neural hearing loss in right ear and moderate sensory neural hearing loss in left ear. At that stage, disability was 60%. Ext.A6 is the C.T. scan report already stated. Ext.A7 is the prescription of Dr.Madhusudanan, M.D, Associate Professor of Neurology, Medical College, Kottayam. This document would show that the present petitioner was; under the treatment of this doctor. The petitioner has further proved Ext.A8 certificate from Alphonsa Eye Hospital, Pala which would

show that he was examined in the said hospital and found to have Lagophthelnios right eye (inability to close the eye fully) due to paralysis of right facial nerve. He was first seen by this doctor on 26.9.19915 and at that time he was having (1) Lagophthal MOS (Rt); (2) facial nerve paralysis (Rt); (3) multiple scars over eye lids and forehead; (4) vision right eye 6/12 partial LE-6/6 and (5) Naso lacrinal duct stenosis. Various aspects of treatment and further developments of the injuries are also seen stated in the document. These certificates show that his injuries were very serious and his relatives were thinking of saving his life and not of filing a police complaint. Claimant was also not able to speak properly and when they were in Medical College Hospital relatives had knowledge only from RW1. Therefore, filing of FIR by delay of six days is explained. Evidence of PWs 1 and 2 and RW2 was relied on by the tribunal and found that RW2 was not cross-examined etc. shows that from the evidence adduced in the case, possible conclusion is that claimant was able to prove that accident occurred while the offending car hit the scooter and he fell down with the scooter and he sustained injuries and RW1 took him to the hospital and

his version was recorded in the wound certificate. We see no ground in interfering in the findings of the tribunal in this appeal proceedings.

6. Now, we will consider the contention of the insurance company that the amount awarded is very high. We have already considered various medical certificates produced in the case and found that claimant suffered serious injuries in the accident. Apart from the above certificates, Ext.A16 is a certificate from Dr. Prathapan Nair attached to the Medical College Hospital, Kottayam. This document shows continuation of treatment and also medication. Ext.A17 is the discharge certificate issued from Lourdes Hospital, Ernakulam. This document shows that the petitioner was admitted on 3.12.1998 and discharged on 8.1.1999 for the treatment of conductive deafness (Lt.). He also produced various medical bills amount to Rs.23,798/-. He needs further treatment expenses also. Tribunal awarded only Rs.35,000/-. For pain and suffering against a claim of Rs.70,000/- tribunal awarded Rs.40,000/-. Considering the nature of injuries, long period of treatment and pain suffered, we are of the opinion that only Rs.25,000/- ought to have been awarded by the tribunal for pain and suffering.

Therefore, Rs.15,000/- is deducted from the amount of compensation. Tribunal awarded disability compensation of Rs.75,000/- and Rs.25,000/- as compensation for loss of earning power. According to the medical certificate his disability was 60%. He was aged 36 years. It is submitted that now he is the Chairman of Pala Municipality and after effect of the accident must have reduced by treatment and passage of time. His monthly income was Rs.3,500/-. He was a businessman. If compensation was calculated on a multiplier method, it would have been much more. But, he has not filed any appeal. As decided by the Full Bench of this Court, disability compensation and compensation for loss of earning power cannot be granted separately. Since compensation was awarded for pain and suffering, loss of actual earning, reimbursement of medical expenses and other expenses etc. we are of the opinion that after awarding compensation for Rs.75,000/- as compensation for disability and Rs.25,000/- should not have been awarded for loss of earning power. Hence, Rs.25,000/- awarded as compensation for loss of earning power has to be deducted. Hence, instead of Rs.2,62,000/- awarded by the tribunal, claimant is entitled only to Rs.2,22,000/- with

interest and proportionate cost at the rate awarded by the tribunal.

7. Last contention raised by the insurance company is that driver of the motor vehicle insured by it had no valid licence to drive a taxi and it has no valid permit. RW1 produced licence to show that he had licence to drive a vehicle like car (Ext.B3). He also produced permit (Ext.B6). Admittedly, at the time of accident, the vehicle was not used as a taxi. He was driving the car after dropping his driver (PW2) and only RW2, a close friend of him, accompanied him. He was not using the car as a taxi or commercial vehicle at that time. No evidence was adduced by the respondent that absence of badge was the reason for the accident. In this connection, we refer to a three-member Bench decision of the Apex Court after considering all earlier decisions on the subject in National Insurance Company Ltd. v. Swaran Singh and others (AIR 2004 SC 1531) and summarised the law at paragraph 105 as follows:

> "105. The summary of our findings to the various issues as raised in these petitions are as follows:
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> (i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare

legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under section 163-A or section 166 of the Motor Vehicles Act, 1988 inter alia in terms of section 149 (2) (a) (ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence of disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of

> the vehicle; the burden of proof wherefore would be on them.
>
> (v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.
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> (vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149 (2) of the Act.
>
> (vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfill the requirements of law or not will have to be determined in each case."

8. Section 149 of the Motor Vehicles Act mandates the insurance company to satisfy the awards against third party rights. Exemptions are also specified in the section. Under section 149 (2) (ii), if the driver is 'not duly licensed' or disqualified for

holding or obtaining a driving licence, there is violation of policy conditions. A Full Bench of this Court in Oriental Insurance Co. Ltd. v. Paulose (2004 (1) KLT 8 FB) held that if the driver was having a proper licence, but, period of licence expired at the time of accident, insurance company cannot escape from the liability. At paragraph 9, it was observed as follows:

> "9. The Act embodies beneficent provisions. Such provisions have to be liberally construed. Literal construction can defeat the object and the purpose."

At paragraphs 14 and 15, it was observed as follows:

> "14. The statute specifies the defences, which are open to an insurer. One of these is that the driver was not 'duly licensed' to drive. If it is literally construed, the insurer may be able to evade its liability. This would defeat the purpose of the provision. Thus, a liberal construction deserves to be given. Thus, even if the licence had expired on the date of the accident but was subsequently renewed, it would fulfill the mandate of the statute.
>
> 15. When he is a person duly licensed, the insurer cannot so long as the policy is admitted, avoid the liability to compensate the injured or to indemnify the insured, because none of the conditions in the policy coming within S. 149 (2) has been violated in this case."

9. Even though insurance company can raise the contention regarding violation of policy conditions by

the insured, it is settled law that the burden to prove the above defence is on the insurer. With a view to avoid its liabilities, it is not sufficient for the insurer to show that the person driving at the time of accident was not duly licensed but it must further be established that there was a breach on the part of the insured and the alleged breach has contributed to the accident. (See: Narcinva V. Kamath and another v. Alfredo Antonio Doe Martins and others ((1985) 2 SCC 574); Skandia Insurance Co. Ltd. v. Kokilaben Chandevadan and others ((1987) 2 SCC 654); Sohan Lal Passi v. P.Sesh Reddy and others ((1996) 5 SCC 21) and United India Insurance Co. Ltd. v. Lehru and others ((2003) 3 SCC 338). In Swaran Singh's case (supra), after considering the three-member Bench decision in Sohan Lal Passi's case (supra), it was observed as follows:

> "61. A bare perusal of the provisions of section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception."
>
> "70. As has been held in Sohan Lal Passi (supra), the insurance company cannot shake off its liability to pay the compensation only by saying that at the relevant point of time the vehicle was driven by a person having no licence."

Swaran Singh's case (supra) was recently followed in Lal Chand v. Oriental Insurance Co. Ltd. ((2006) 7 SCC 318).

10. Learned counsel for the insurance company relied on the recent decision of the Supreme Court in National Insurance Co.Ltd. v. Kusum Rai and others ((2006) 4 SCC 250). In that case, appeal was filed by the insurance company against the finding of the High Court holding that even though driver was not holding a valid driving licence to drive the type of vehicle involved in the accident at the time of accident, insurance company is liable to pay the amount and recover the same from the owner of the vehicle, the insured. The Hon'ble Supreme Court dismissed the appeal filed by the insurance company. Registered owner did not file any appeal from the decision of the High Court. Claimants are also not aggrieved by the decision of the High Court. Owner did not enter appearance before the Apex Court as can be seen from paragraph 14 of the judgment. Kusum Rai's case decided by a two-member Bench of the Apex Court, relied on the dicta of Swaran Singh's case decided by a three-member Bench and observed as follows:

> "14. This court in Swaran Singh ((2004) 3 SCC 297) clearly laid down that the liability of the insurance company vis-a-vis the owner would depend upon several

factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle. The question as regards the liability of the owner vis-a-vis the driver being not possessed of a valid licence was considered in Swaran Singh ((2004) 3 SCC 297) stating: (SCC pages 336-37, para 89):

> "89. Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (2) of the said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are: (a) motorcycle without gear, (b) motorcycle with gear, (c); invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller, and (g) motor vehicle of other specified description. The definition clause in section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', ' medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal as a

> person possessing a driving licence for 'motorcycle without gear', (sic may be driving a vehicle) for which he has no licence. Cases may also arise where a holder of driving licence for 'light motor vehicle' is found to be driving a 'maxi-cab', 'motor-cab' or 'omnibus' for which he has no licence. In each case, on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident......."

Therefore, the matter has to be decided on the facts of each case. Here, no evidence was adduced by the insurance company to the effect that absence of badge was the cause of accident or it is a fundamental breach. It is proved by Ext.B3 that insured had a valid licence to drive the type of vehicle (car) he was driving. At the time of accident, it was not used as a taxi or commercial vehicle. Even though it is contended in the appeal that first respondent had no badge, it is not contended that absence of badge is a fundamental breach of policy condition and it is a cause for the accident. There is no such cross-examination by the insurance company on that point when RW1 was examined. On the facts of this case, there is no evidence to show that absence of badge was the cause of accident. It is true that in

appropriate cases from the evidence adduced tribunal can hold that insurance company is not liable to pay compensation for the absence of proper licence or badge with the driver. On the facts of this case, we are of the opinion that insurance company cannot be exonerated from indemnifying the insured.

Appeal allowed partly.

Parties are directed to bear their costs in this appeal.

J.B.KOSHY
JUDGE

K. HEMA
JUDGE

vaa

J.B. KOSHY AND
K.HEMA,JJ.

M.A.C.A.NO.242/2003

Judgment

Dated:10th October, 2007